ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In the matter of	)	
	)	
Amendment of Section 73.202	)	MM Docket No. 92-59
Table of Allotments	)	RM-7923
FM Broadcast Stations.	)	
(Bradenton, Florida)	)	

ORIGINAL FILE

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPLY TO OPPOSITION TO JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT, OR, ALTERNATIVELY, SUPPLEMENT TO COMMENTS OF ENTERTAINMENT COMMUNICATIONS, INC.

The petitioner, Sunshine State Broadcasting Company, Inc. ("Sunshine"), hereby submits its reply to the Opposition to Joint Request for Approval of Settlement Agreement, or, Alternatively, Supplement to Comments of Entertainment Communications, Inc. ("Opposition" of "Entertainment"). Sunshine, simultaneously with filing of this reply, is filing a Motion to Strike Entertainment's opposition as an impermissible pleading under Section 1.415(d) of the Commission's Rules. Entertainment itself describes the pleading in its alternative characterization as a "supplement" to its comments, and such a supplement cannot be filed without Commission authorization. To the extent, however, that the Commission considers the supplemental comments (however styled) of Entertainment, it should also consider this reply.

JOINT REQUEST FOR APPROVAL

Entertainment has interposed a pro forma objection to the Joint Request in an attempt to justify its supplemental comments. There was no specific objection to the Joint Request, and Entertainment has effectively conceded that the Joint Request complies in all respects with Section 1.420(j) of the Commission's Rules. The granting of the Joint Request would be in the public interest because it partially resolves the proceeding by removing one of the parties, obviating the need for the Commission to expend its time and resoures considering the counterproposal that is being withdrawn. In order to satisfy the public interest requirement, it is not necessary that a settlement resolve all outstanding issues in a proceeding; the Commission routinely approves partial settlements.

REPLY TO SUPPLEMENTAL COMMENTS

Entertainment seeks to supplement its original comments in the proceeding by submitting additional argument, a new statement from its aerospace consultant, correspondence and exhibits with the Federal Aviation Administration, and now an entirely new declaration from an additional consultant. This case demonstrates the wisdom of the Commission's decision in West Palm Beach that, while the Commission will take into consideration allegations that no theoretical site exists due to air hazard considerations, its usual practice is to defer a determination of the suitability of a transmitter site in the application stage, especially if the air space matters are complex, and the consultants disagree. FM Table of Allotments, (West Palm Beach, Florida), 6 FCC Rcd 6975 (1991).

Entertainment originally made the argument that the FAA would not approve of the tower as proposed because of alleged adverse effect on Peter O'Knight Airport, because the reference point was in a current VFR flyway, and because the proposed tower would affect the minimum vectoring altitudes for MacDill Air Force Base. In its consolidated reply comments, Sunshine pointed out that Entertainment's "expert" had made a mistake with regard to Peter O'Knight Airport, that the VFR flyway issue was a subjective determination, requiring a number of factors to be taken into consideration by the FAA, and that MacDill Air Force Base is on the closing list of military bases that affect air-space utilization. Now, in its "Supplemental Comments," Entertainment indicates that it is actively urging the FAA to issue a determination of hazard for a mythical tower at a mythical site. The wisdom of the Commission's West Palm Beach policy, leaving such determinations to the application stage, is amply demonstrated once again. Should Entertainment be allowed to supplement its comments, this matter could proceed ad infinitum.

Based on Entertainment's latest supplement, apparently the Peter O'Knight Airport issue has been quietly dropped, and now a potential electromagnetic interference issue has been substituted. Obviously, by allowing a continued series of supplemental comments, new issues can be raised in which the proponent has no real opportunity to reply. However, it should be noted that even if there is a determination that, at a mythical site and with a mythical tower proposal, potential for EMI exists, there is also recent precedent for the FAA's, even after having issued a

determination of hazard, reconsidering its determination of hazard and changing the frequency of a navigational aid to accommodate a proposed tower.

In addition, a determination by the FAA specialist concerning the potential for EMI is then subject to further negotiations with the FAA, especially by a real proponent. As will be shown below, there is a very significant difference between serious discussions by a real proponent of a tower attempting to work out difficulties with the FAA, and an "expert" initiating discussions in an effort to convince the FAA to deny a proposal.

The supplemental comments reveal that, long after the date for submitting comments in this proceeding, Entertainment, a Commission licensee, had its agents file with the FAA a false proposal for the construction of a mythical tower at a mythical site. On June 30, 1992, Dan Tenold, Entertainment's "expert," submitted FAA Form 7460-1 to the FAA regional office at East Point, Georgia. In the signature block of Form 7460-1 it states

> I hereby certify that all of the above statements made by me are true, complete, and correct to the best of my knowledge.

That certification is signed by Daniel P. Tenold. According to the form, Mr. Tenold has certified that there is a proposal to construct a 1025-foot tower at a given set of coordinates, and that work on the tower would begin "ASAP", which is interpreted to mean as soon as possible. Obviously, none of the information is true. Neither the expert nor Entertainment actually proposes to construct a tower at the coordinates given, or proposes to begin work as soon as possible. Furthermore, it is noted that the submission of FAA

form 7460-1 is defective because it did not include all of the information requested in Paragraph 2 of the form. Presumably this false filing was sponsored by Entertainment in an effort to show that the FAA would deny a tower at that location. Sunshine submits that it is basically improper for a Commission licensee to file false documents with the federal government for its own advantage.

Entertainment is certainly not contending that this false certification is filed to advance the public interest. Rather, Entertainment seeks to advance its own private interest by objecting to Sunshine's proposal. It is submitted further that the Commission should sanction licensees who engage in these false filings. It is not proper conduct, and to condone these false filings and later subsequently accept them in rule-making proceedings will encourage opponents in the rule-making process to file false documents with the FAA, bogus permit applications with agencies having supervision over environmental matters, and false proposals to zoning authorities.

A determination of hazard by the Federal Aviation Administration, under the circumstances herein present, would not be relevant or germane to a consideration by the FCC of Sunshine's proposal. First, the FAA is not considering a "real proposal". In the letter to the FAA official addressed as "Dear Armando", Mr. Tenold indicates that he has already had discussions with the FAA official concerning his proposal. Certainly, Mr. Tenold has not been advocating the approval by the FAA of the proposal, and it can be assumed Mr. Tenold has not had informal discussions with the FAA in order to cooperatively work with the FAA in submitting a

proposal to the FCC that would not affect aeronautical considerations. As demonstrated with the Peter O'Knight Airport issue, sometimes the re-siting of a tower a short distance can clear an otherwise unacceptable airspace impact. Normally, discussions are held between the proponent and the FAA in an effort to alleviate air space concerns. Here, the so-called proponent of this tower is urging a determination of hazard.

One of the issues raised by Entertainment was the VFR fly-way issue. Determination of hazard to a VFR fly-way is a subjective determination made by the air specialists at the FAA based on a whole series of factors, considerations, and concerns. It is not a cut-and-dried application of a fixed standard. Here, the expert is urging the FAA official to make a determination that, in fact, a VFR fly-way exists along this route. It can be assumed that, since the proponent of the tower seeks an air hazard determination, they would hardly call to the attention of the FAA the various factors that it would be advanced by a real proponent of a tower. In Mr. Tenold's declaration accompanying the supplemental comments, he indicates that he has had a number of telephone conversations with the FAA airspace specialist concerning the proposal, which of course raises the question not only of impermissible interference but also raises the question that if Sunshine's tower is such an obvious violation of the VFR fly-way requirements, why have a number of conversations?

There is an additional reason for the Commission to not countenance this type of activity. It could be, that Sunshine's competitor, to further its own private interests, has so "poisoned

the well" at the FAA that it would be much more difficult for Sunshine to obtain approval of its tower, with the potential consequence of denying service to a large number of people. It is respectfully suggested that the Commission think long and hard before it encourages this type of activity.

There are two additional reason why a determination of hazard by the FAA under these circumstances would not be relevant or germane to the Commission's consideration of the proposed channel change. First, that determination is an initial one, and a real proponent has the opportunity under the federal air regulations to appeal the determination. As has been noted, even after issuing a determination of hazard, the FAA, working with a real proponent, has been willing to modify the frequencies of a navigation aid in order to accommodate a tower.

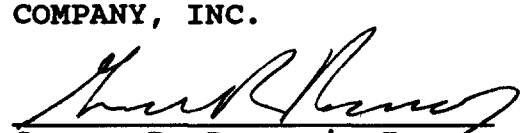
Second, as Mr. Chevalier noted in his declaration attached to the supplemental comments, "FAA obstruction evaluation studies are made on the basis of existing factors, not on what they used to be or may be in the future." Sunshine agrees.

Conisistent with the procedures established by the FCC, Sunshine first seeks the rule change to modify its channel. Taking into consideration any restrictions that exist on the channel modification at the time the Commission's decision on the rulemaking is issued, and any further considerations that might arise prior to the filing of the application to implement the rule change, Sunshine will first find a site and obtain the requisite reasonable assurance. Then, with site in hand, Sunshine will discuss the proposal with the FAA and, if necessary, will modify

the tower site to a location that would not be a hazard to air navigation. It is at that point that the FAA would make its determination, and that point is in the future. It is in the future that Mac Dill Air Force Base will be closed, it is in the future that the changes in the air space in the Tampa area will occur, and it is in the future that Sunshine will obtain a determination of no hazard for its tower.

Respectfully submitted,

SUNSHINE STATE BRAODCASTING COMPANY, INC.

By: 
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August 27, 1992

CERTIFICATE OF SERVICE

I, Prastavna Sinha, an employee of the law firm Borsari & Paxson, hereby certify that a true copy of the foregoing REPLY TO OPPOSITION TO JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT, OR, ALTERNATIVELY, SUPPLEMENT TO COMMENTS OF ENTRETAINMENT COMMUNICATIONS, INC. was sent this 27th day of August, 1992, via first class United States mail, postage prepaid, to each of the following:

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